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No. 87-1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SEQUOIA BOOKS, INC.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the search warrant procedure comply with constitutional authority? Is there any conflict between the Illinois Appellate Court opinion and decisions from the Courts of Appeals?

2. Did the procedure which provided special interrogatories to assure that single general verdict was based upon specific consideration of all the magazines comply with constitutional authority? Did this procedure affect the independent function of the jury? Did it actually benefit petitioner?

3. Is the Illinois statute invalid for providing no definition of the term "prurient"?

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PRAYER

Respondent asks this Court to deny the Petition for Writ of Certiorari to review the judgment and order of the Appellate Court of Illinois, Second District, insofar as the petitioner does not raise any issues worthy of review.

OPINION BELOW

The opinion below, dated November 17, 1987 in cause No. 2-86-1030, is uncited pursuant to Illinois Supreme Court Rule 23. A copy is reprinted in petitioner's appendix.

STATEMENT OF THE CASE

Petitioner, Sequoia Books, owns and operates the Denmark Bookstore in Aurora, Illinois. It was charged by complaint with obscenity in Kendall County, Illinois, and found guilty September 16, 1986 after a jury trial. It was sentenced to a fine of $1,015.50 and costs of $88.

The charge of obscenity arose after a Kendall County judge issued a search warrant, supported by an affidavit describing the context in which certain magazines were displayed in the Denmark Bookstore and particularly describing specific sex acts depicted in them. Several magazines purchased from the store were provided to the issuing magistrate. Pursuant to a warrant limiting seizure to magazines portraying specifically described sexual acts, authorities seized 224 such magazines on March 26, 1986.

Two days later, March 1, 1986, the criminal complaint was filed, alleging a single count of obscenity based on all 224 magazines. At trial, all 224 magazines were introduced. Sequoia Books did not present any evidence on its own behalf. Before deliberation, the jury was instructed and given a single general verdict form, along with special interrogatories requiring the jury to answer "yes" or "no" as to the obscenity of each of the magazines. The jury found all 224 magazines obscene.

On direct appeal, petitioner raised five allegations of error, including the three claims he raises in his petition to this Court.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON WHY THIS COURT SHOULD REVIEW THE SEARCH WARRANT PROCEDURE SINCE IT COMPLIED WITH CONSTITUTIONAL AUTHORITY; PETITIONER HAS FAILED TO SHOW THAT CONSTITUTIONAL ERROR OCCURRED OR THAT THE STATE'S DECISION CONFLICTS WITH DECISIONS FROM THE COURTS OF APPEALS.

Sequoia Books alleges two reasons why this Court should review the search warrant procedure in this case: 1) this Court must correct constitutional error that occurred within that procedure and 2) it must resolve a conflict in the law regarding search warrants in first amendment cases. However, neither is a reason for granting review.

First, constitutional error did not occur in this case. Despite Sequoia Books' claim to the contrary, the search warrant procedure was consistent with the special first amendment requirements outlined by this Court in *New York v. P.J. Video*, 475 U.S. 868 (1986). *P.J. Video* requires that, before authorizing the seizure of materials presumptively protected by the first amendment, the magistrate must make sure that the warrant application is supported by affidavits setting forth specific facts. This requirement enables the judge to focus searchingly on the question of obscenity. Furthermore, the policy may not dispense with the warrant requirement, as they ordinarily could in exigent situations, whenever this would constitute a prior restraint. Rather, large-scale seizure must be preceded by an adversarial hearing on the obscenity question before the search can take place. But it is a defendant's burden to make the pretrial showing of a

"substantial" prior restraint before such an adversarial hearing need take place.

But aside from these, warrant applications for seizures of allegedly obscene magazines are the same as those applied generally. The magistrate must apply a uniform standard of probable cause: a probability or substantial chance of criminal activity, not an actual showing.

The principles of *P.J. Video* were followed by the issuing magistrate in the cases at bar. Despite petitioner's contrary claim, the judge who issued the warrant after an adversarial hearing did searchingly focus on the obscenity of the magazines to be seized. The judge made sure that the warrant application was supported by an affidavit describing the context in which certain magazines were displayed in the Denmark Bookstore and particularly describing specific sex acts depicted in them. Several magazines purchased from the store were provided to the issuing magistrate for his review. This gave the judge the opportunity to determine that there was a probability of criminal activity occurring in the bookstore, namely the sale of magazines not protected by the first amendment. The judge therefore issued a warrant authorizing officials to seize such magazines.

Moreover, the warrant was not a general one which left total discretion to the executing officers as to what items and what quantity was to be seized is refuted. Rather, the officers were limited to seizing only the magazines that portrayed the sexual acts specifically described on the warrant.

Nor did the issuance of the warrant constitute a prior restraint. A prior restraint occurs only when the police rely on exigent circumstances to dispense with the warrant requirement and make a large-scale seizure. There

is no prior restraint, even where there is a large-scale seizure, so long as the police first obtain a warrant after an adversarial hearing on the obscenity question. Moreover, it is defendant's own burden to prove the prior restraint before the holding of the adversarial hearing. Thus, there was no prior restraint in this case since the State secured a warrant after an adversarial proceeding and since Sequoia Books never proved the existence of a substantial prior restraint before the seizure took place.

Because of this failure, there is no evidence that Sequoia Books was in any way economically harmed, that the police seized any more than a single copy of each magazine, or that the store was closed down. Rather, it appears from the record that some magazines were seized for evidentiary purposes and the store continued to operate throughout the entire prosecution.

Similar warrant procedure was upheld in *People v. Sequoia Books*, 145 Ill. App. 3d 1054, 495 N.E.2d 1292 (2nd Dist. 1986), *People v. Sequoia Books*, 146 Ill. App. 3d 1, 496 N.E.2d 740 (2nd Dist. 1986), *People v. Sequoia Books*, 150 Ill. App. 3d 211, 501 N.E.2d 856 (2nd Dist. 1986) and *People v. Sequoia Books*, Nos. 2-86-563 and 2-86-577 (1987) (cert. pending). Therefore, Sequoia Books has failed to show the existence of a constitutional error that needs correction by this Court.

Sequoia Books also claims that the Illinois Appellate Court's refusal to condemn these warrants as general warrants cannot be squared with two cases from the Courts of Appeals, *United States v. Guarino*, 729 F.2d 864 (1st Cir. 1984) and *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). But, in fact, there is no conflict between these cases and the Illinois Appellate Court opinion. These opinions agree that 1) a search warrant must define what is

to be seized with specificity so that the executing officer may not exercise judgment when making seizures and that 2) probable cause for a warrant requires that the materials first be viewed.

In *Guarino*, specificity was lacking because the warrant authorized nothing more specific than the seizure of "obscene materials," leaving it to the officer's opinion to decide what is obscene. *Guarino*, 729 F.2d at 865, 867. But specificity was not lacking in this case. The warrant authorized the officers to seize only those magazines depicting specifically defined acts. The warrants at bar contained the specificity found lacking in *Guarino*.

In *Tupler*, probable cause was lacking because the State did not view the alleged obscene films nor tender them to the issuing judge for review, but assumed they were obscene from film packaging. *Tupler*, 564 F.2d at 1297. But probable cause was not lacking in this case. The affidavit of the investigator demonstrated that he himself saw how the magazines were displayed in the Denmark Bookstore and he particularly described the specific sex acts that he saw depicted in them. The issuing magistrate also had the opportunity to observe several of these same magazines. The warrants at bar were based on the probable cause that was lacking in *Tupler*.

II.

THE PROCEDURE ALLOWING A SINGLE CONVICTION AND GENERAL VERDICT BASED ON NUMEROUS MAGAZINES ASSURED SPECIFIC CONSIDERATION OF ALL THE MAGAZINES BY USE OF SPECIAL INTERROGATORIES; THE SPECIAL INTERROGATORIES DID NOT IMPAIR THE JURY'S INDEPENDENT FUNCTION AND ACTUALLY BENEFITED PETITIONER.

Sequoia Books asks this Court to review the procedure of seeking a single conviction based on numerous magazines because it resulted in constitutional error. He claims that the single count method constituted a prior restraint by denying the jury the opportunity to specifically consider each magazine and creating the probability that no 12 jurors unanimously agreed upon the obscenity of any one magazine. The use of special interrogatories to assure specific consideration did not prevent the error but actually expanded the strict elements of the offense and potentially infringed on the jury's freedom.

However, constitutional error did not occur here. Illinois sought a single conviction for obscenity based on any of 224 individual magazines. To assure, in each case, that all twelve jurors gave specific consideration to all the material, the jurors were required to answer special interrogatories as to the obscenity of each magazine. This procedure was earlier approved in Illinois in *People v. Sequoia Books*, Nos. 2-86-563 and 2-86-577 (1987) (cert. pending).

This Court saw in *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 1362 (1969), that in some circumstances a general verdict can present a problem. Thus, in *Street*, the validity of a general verdict for flag desecration was questionable where there was no way to know from the record whether it was based on the permissible ground

of burning the flag or the impermissible ground of speaking contemptuously about the flag or an impermissible combination of both. But that problem was eliminated at bar by the giving of special interrogatories. These demonstrated that all 224 magazines were deemed obscene and supported its single verdict. This procedure assured that whole jury specifically considered each magazine and reached unanimous agreement before finding any single magazine to be obscene.

The procedure created several additional advantages here, as well. It reduced the vast number of instruction and verdict forms that would have otherwise been necessary, it made it possible to return any non-obscene books to the petitioner, and it lessened the collective impact of the material. Moreover, it exposed petitioner to only one obscenity conviction, rather than 223 additional convictions.

While it is true that special interrogatories are not generally given in criminal trials, the Constitution does not forbid them. *See Heald v. Mullaney*, 505 F.2d 1241 (1st Cir. 1974). They are suspect only insofar as they may jeopardize the independence of the jury by coloring its decision-making process with a step-by-step series of questions inexorably leading it to conclude that a defendant is guilty. *Heald*, 505 F.2d at 1246; *United States v. Spock*, 416 F.2d 165, 182 (1st Dist. 1969). Where they do not impair the jury's independent function and actually benefit a defendant, their use will survive a constitutional challenge. *Heald*, 505 F.2d at 1246.

Here, the special interrogatories imposed no special burden on the jury. The jury was duty bound to examine each magazine and the special interrogatories assured that it met its duty. Had the jury been instructed in the man-

ner requested by petitioner, its function would have been identical: to examine each magazine and determine whether or not it was obscene. Moreover, as already explained, Sequoia Books actually benefited in several material ways from this procedure. The procedure here survives constitutional challenge. No constitutional error occurred.

III.

THE ILLINOIS STATUTE IS NOT INVALID FOR FAILING TO PROVIDE A DEFINITION OF "PRURIENT."

Sequoia Books asks this Court to hold the Illinois Obscenity statute unconstitutional for failure to provide any definition of the term "prurient". The challenge is premised on *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794 (1985) where a definition of "prurient" provided in a Washington obscenity statute swept too broadly. However, this Court need not intervene since neither *Brockett* nor any constitutional authority requires a definition of the term "prurient".

The Illinois statute defines obscenity as follows:

> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions, or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

This definition is virtually a word-for-word copy of the definition this Court provided in *Miller v. California*, 413

U.S. 15, 93 S.Ct. 2607 (1973). In fact, the legislative debates indicate that Illinois' obscenity definition is meant to be totally compatible with the holding of *Miller v. California.* (P.A. 84-709, Section 1, 84th Gen. Ass., 1985; Senate Debates, 84th Gen. Ass., May 8, 1985, pp. 138-139; House Debates, 84th Gen. Ass., June 24, 1985, pp. 160-164).

The term "prurient" is not specifically defined. Rather, it appears in the same way it appears in *Miller.* In footnote 13 of *Brockett,* this Court noted that obscenity statutes which leave the term undefined or which define it only by case law have been upheld. In fact, in most states the term "prurient" is not defined, but this has not rendered the statutes invalid. *Brockett,* 105 S.Ct. at 2802, n.13. *Brockett* contemplates only that, where a state does undertake to define the term "prurient," it may not do so in a way that includes a normal interest in sex.

The Illinois statute is clearly constitutional under *Miller* and *Brockett.*

CONCLUSION

Wherefore, the People of the State of Illinois ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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